Dr Andre Das v Nasharuddin bin Aidid

HIGH COURT (IPOH) — ORIGINATING SUMMONS RS 11–20 OF 1995
CHIN FOOK YEN J
23 FEBRUARY 2000

Civil Procedure *— Judgments and orders — Judgment in default — Setting aside — Judgment set aside on same day upon oral application by defendant — Whether magistrate was functus officio upon entering judgment —Whether breach of O 29 r 14 of Subordinate Courts Rules 1980*

The learned magistrate had entered judgment in default of appearance ('the JID') against the defendant. However, on the same day, upon an oral application by the defendant, the JID was set aside in the absence of the plaintiff. The plaintiff objected and argued that: (i) the magistrate was functus officio upon entering the JID; and (ii) there was a breach of O 29 r 14 of the Subordinate Courts Rules 1980 ('the SCR').

Held, dismissing the appeal:

(1) An order pronounced by the judge can always be withdrawn, or altered, or modified by him until it is drawn up, passed and entered and, when a judge has pronounced judgment, he retains control over the case until the order giving effect to his judgment is formally completed. The judgment by the magistrate in this case was far from being formally completed and as such the learned magistrate was clearly not functus officio. Thus, the learned magistrate was perfectly within her power as a presiding officer to recall her own order given earlier, on the same day, as here, before the court had risen for the day, to change, vary or set aside her own order and she could do so without the necessity of a formal application in writing (see pp 526G, 527A–B).

(2) Rule 14 of the SCR provides for a judgment formally completed, meaning having it entered and drawn up, otherwise service thereof could not be effected and no receipt acknowledged. In the event a written application becomes necessary. It follows, therefore, that before it is formally completed, the court may entertain oral application to vary it, as the case may be (see p 527D).

[Bahasa Malaysia summary

Majistret yang arif telah memasuki suatu penghakiman ingkar kehadiran ('JID') terhadap defendan. Bagaimanapun, pada hari yang sama, melalui permohonan lisan oleh defendan, JID tersebut telah diketepikan tanpa kehadiran plaintif. Plaintif telah membantah dan menghujahkan: (i) majistret telah functus officio setelah memasuki JID tersebut; dan (ii) terdapat perlanggaran A 29 k 14 Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR').

Diputuskan, menolak rayuan tersebut:

(1) Suatu perintah yang diumumkan oleh hakim boleh sentiasa ditarik balik, atau dipinda, atau diubah oleh beliau sehingga ia dibuat, diluluskan dan dimasukkan dan, apabila hakim telah mengumumkan penghakiman, beliau kekal mengawal kes tersebut sehingga perintah yang memberikan kesan kepada penghakiman beliau telah tamat secara rasmi. Penghakiman oleh majistret di dalam kes ini jauh daripada selesai secara rasmi dan oleh itu majistret yang arif dengan jelas tidak functus officio. Oleh demikian, adalah betul-betul di dalam kuasa majistret yang arif sebagai pegawai yang bersidang untuk memanggil balik perintah beliau sendiri yang diberikan sebelum ini, pada hari yang sama, seperti di sini, sebelum mahkamah telah ditangguhkan untuk hari tersebut, untuk menukar, meminda atau mengetepikan perintah beliau sendiri dan beliau sepatutnya mampu berbuat sedemikian tanpa keperluan suatu permohonan rasmi secara bertulis (lihat ms 526G, 527A–B).

(2) Kaedah 14 KMR memperuntukkan bagi penghakiman yang telah diselesaikan secara rasmi, iaitu setelah ia dimasukkan dan dibuat, kalau tidak, serahan tidak boleh dilaksanakan dan penerimaan tidak boleh diakui. Dalam keadaan demikian, suatu permohonan bertulis adalah perlu. Maka, berikutan dengan itu, sebelum ia telah diselesaikan secara rasmi, mahkamah boleh melayan suatu permohonan lisan untuk meminda, jika kes tersebut adalah sedemikian (lihat ms 527D).]

Notes

For cases on judgment in default, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2763–2764.

Cases referred to

Harrison's Share Under a Settlement, Re [1955] 1 Ch 260 (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 (refd)
Lim Yam Teck v Lim Swee Chiang & Anor [1979] 1 MLJ 162 (refd)
Ling Nam Rubber Works v Leong Bee & Co (No 2) [1968] 1 MLJ 265 (refd)

Legislation referred to

Rules of the High Court 1980 O 42 r 13
Subordinate Courts Rules 1980 O 29 r 14, O 54 r 16(2)(b)

Appeal from: Suit No 11–20 of 1995 (High Court, Ipoh)

Nathan (Adliza, Subra & Partners) for the appellant.
Nasharuddin bin Audid, respondent representing himself.

Cur Adv Vult

Chin Fook Yen J: This is an appeal by the plaintiff form the decision of the learned magistrate in allowing an application by the defendant to set aside a default judgment ('the JID') given in favour of the plaintiff. The events leading up to these proceedings are not disputed and can be simply stated below.

(1) On 26 May 1994, plaintiff commenced this action against the defendant claiming for a sum of RM1,100 being rentals with interest and costs.

(2) On 4 October 1994, the defendant entered appearance therein admitting the plaintiff's claim.

(3)(a) On 6 April 1995, when the case was called up for the first time the plaintiff was present but the defendant was absent and in his absence JID was entered against him.

(b) However, on the same day after the plaintiff had left, at about 10.30am the defendant appeared in court. Apparently upon his oral application, the JID entered earlier was then set aside by the learned magistrate in the absence of the plaintiff.

(c) Plaintiff's solicitors subsequently received a letter from the magistrate court dated 6 April 1995 informing them of the fate of the JID. At the same time the court also informed them that the case had been fixed for mention on 13 April 1995 and the parties were required to attend on the mention date.

(4) On 13 April 1995, plaintiff's counsel appeared in court, but after being informed by the learned magistrate that she stood by her decision in setting aside the JID, the counsel decided to appeal against the setting aside decision.

On appeal before me, the objection of the plaintiff is two fold: (1) the learned magistrate was functus officio upon entering JID and (2) there was a breach of O 29 r 14 of the Subordinate Courts Rules 1980 ('the SCR'). After hearing submission on both sides, I dismissed the appeal with costs. I did so holding the view that the learned magistrate was right in her decision in setting aside the JID. To my mind, the learned magistrate was perfectly within her power, as a presiding officer, to recall his or her own order given earlier, on the same day, as here, before the court had arisen for the day, to change, vary or set aside her own order. The answer to the plaintiffs objection is provided in *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 at p 144, where the Federal Court held that:

> Clearly the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, ... *unless it is a judgment by default or made in the absence of a party at the trial or hearing.* (Emphasis added.)

In another Federal Court case of *Ling Nam Rubber Works v Leong Bee & Co (No 2)* [1968] 1 MLJ 265, the Federal Court quoted with approval the judgment of Jenkins LJ in *Re Harrison's Share Under a Settlement*, when it held at p 266:

A that an order pronounced by the judge can always be withdrawn, or altered, or modified by him until it is drawn up, passed and entered 'and that' when a judge has pronounced judgment he retains control over the case until the order giving effect to his judgment is formally completed.

Here it talked of judgments generally and did not confine to default judgments only. In the instant case, it was a judgment by default entered in the absence of the defendant without trial or hearing and, if I may add, the judgment was far from being formally completed. The learned magistrate concerned was, in my opinion, certainly not functus officio.

This brings me to O 29 r 14 of the SCR which is almost identical to O 42 r 13 of the Rules of the High Court 1980. Order 29 r 14 reads:

> Where in these rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the court and serve it on the party who has obtained the judgment within 30 days after the receipt of the order or judgment.

In my view r 14 of the SCR talks of a judgment formally completed, meaning having it entered and drawn up, otherwise service thereof could not be effected and no receipt acknowledged. In the event a written application becomes necessary. It follows, therefore, that before it is formally completed, the court may entertain oral application to vary it, as the case may be. This view is in consonant with the authorities referred to.

In yet another case of *Lim Yam Teck v Lim Swee Chiang & Anor* [1979] 1 MLJ 162, a motor vehicle accident case, after full trial, the judge dismissed the action with costs. Thereafter, the judge had this to say at p 163:

> After I had dismissed this action and arisen from court as I was not too happy with the end result, I gave the matter further consideration and I then took the view that I may not be justified in having come to the conclusion ...
>
> That same afternoon I directed my personal assistant to inform both counsel not to treat the matter as concluded and final as I would like to hear further submissions from them. I took the view that my earlier decision should be varied ... .

In that case, even though the learned judge had given his decision and had arisen from court, yet when he was down from the bench and gave the matter a second thought, he decided to recall the matter on the very same afternoon for further submissions and consideration and subsequently he decided to change his decision. Basing on these authorities, I am of the view that there is nothing wrong for the learned magistrate to recall her earlier order on the same day and set aside her order, whether on her own or upon application, as she was still not functus officio at that time and she could do so without the necessity of a formal application in writing.

There is one observation I would like to make. In the instant case, the claim, being only RM1,100, should have been filed under the Small Claims Procedure of O 54 of the SCR, the provisions of which would control the entire action and from the Record of Appeal before me, O 54 had been

totally overlooked. It would not do justice to the parties, especially where, as here, the defendant had admitted the claim, to dismiss the entire action. A dispensation of all the formalities might not be unfair in view of the time consumed since 1994, if not already wasted. In the circumstances the better remedy would be to quickly restore the case for hearing under O 54 r 16(2). The magistrate could straight away proceed with the examination of the judgment debtor to consider the matter under r 16(2)(b), a concession not to be taken as precedence.

For reasons aforesaid, the appeal is dismissed with costs. The magistrate shall proceed with the matter under O 54 r 16 of the SCR.

Appeal dismissed.

Reported by Wong Siok Chin